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IN THE

Supreme Court of the United States

1969

October Term, 1969
No. 768

THE BOYS MARKETS, INC.,

Petitioner,

vs.

RETAIL CLERKS UNION, LOCAL 770,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT.

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THE BOYS MARKETS, INC.;

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RETAIL CLERKS UNION, LOCAL 770,

Respondent.

BRIEF FOR RESPONDENT.

I.
QUESTION PRESENTED.

The sole question presented in this case is whether the United States District Court has jurisdiction to enjoin a strike where that strike is in violation of a no-strike clause contained in a collective bargaining agreement.

II.
STATEMENT.

On February 19, 1969, the Petitioner (sometimes referred to as "Employer" herein) filed a complaint for injunctive relief and for specific performance of an agreement to arbitrate in the Superior Court of the State of California (App. 4). The complaint alleged that there existed between the parties a five (5) year

collective bargaining agreement covering the period April 1, 1964, through March 31, 1969, containing, among other covenants, a promise of the Respondent (sometimes referred to as "Union" herein) that it would not engaged in any strike, work stoppage or other concerted economic activity for the term of the agreement (App. 6). The complaint further alleged that on February 18, 1969, the Union members employed in the Employer's Store located in Cudahy, California, objecting to the assignment by the employer of certain work to non-union members, engaged in a strike and work stoppage and picketed the store with signs informing the public that the Union was "on strike" (App. 9).

On the next day, the Superior Court issued a temporary restraining order upon the Employer's request prohibiting striking, picketing or other forms of work stoppages pending a hearing on order to show cause to be held March 5, 1969 (App. 36).

On February 20, 1969, the Union filed its petition for removal with the District Court (App. 42). On February 25, 1969, the Union filed with the District Court a notice of motion for order quashing the temporary restraining order previously made by the State Court. Hearing on the motion was set for March 10, 1969, (App. 2).

On March 3, 1969, the Employer filed its motion and application for orders compelling arbitration and enjoining the conduct which had been enjoined by the State Court temporary restraining order (App. 2, 50). On March 10, 1969, a hearing was held on both motions. After argument, the District Court directed counsel for the Employer to prepare an order direct-

ing that arbitration proceed and granting injunctive relief pending arbitration. The order was filed and entered on March 13, 1969 (App. 2, 84).

The Union filed an answer on March 13, 1969 (App. 89) in which it denied the material allegations of the original complaint.

In granting injunctive relief, the District Court specifically enjoined and restrained the Union, pending the outcome of arbitration, from picketing or engaging in strikes or work stoppages or in inducing others to do so. The findings of fact and conclusions of law filed the same date (App. 74) recite that, based upon the Employer's complaint which was attached to the removal petition and upon the memoranda of points and authorities, irreparable injury would occur to the Employer unless the Union was restrained from engaging in such acts (App. 82). The Court concluded as a matter of law that the injunction "must be granted," (App. 83) and thereafter an appeal was taken.

The Court of Appeals for the Ninth Circuit on September 26, 1969, reversed, holding that this Court's decision in *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195 (1962), was "nearly on all fours with the instant case," and that it was "bound by the holding of *Sinclair.*" (App. 98).[1] Reversing the judgment of the District Court, it quashed the injunction and remanded the case for further proceedings.

This Court granted *certiorari* on January 12, 1970.[2]

---

[1]The opinion of the Court of Appeals is reported at 416 F. 2d 368.

[2].... U.S. ...., 90 Sup. Ct. 53.

III.

SUMMARY OF ARGUMENT.

In *Sinclair Refining Company v. Atkinson*,[3] this Court held that the Congress had rejected the argument that "injunctions against peaceful strikes are necessary to make the arbitration process effective." The Court properly determined that "whatever may be said for the argument, Congress has rejected it."[4]

The decision in *Sinclair* was based upon a factual situation which is indistinguishable from the present case.[5]

There exists no compelling reason for withdrawing from the *Sinclair* opinion. But even if there were, it would be for the Congress of the United States to enact the necessary measures and not for this Court to withdraw its earlier decision to that effect.

This Court cannot "accommodate" Section 4 of the Norris-LaGuardia Act with Section 301 of the Labor-Management Relations Act as the Petitioner requests without judicially repealing the former statute.

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[3]370 U.S. 195 (1962).

[4]*Id.* at 213.

[5]The Court of Appeals so held (Appendix, p. 98) and Petitioner concedes in its brief that the only distinguishable feature of the two cases is immaterial (Petitioner's Brief, p. 9).

IV.

ARGUMENT.

The opinion of this Court in *Sinclair v. Atkinson* was a proper interpretation of the applicable Federal labor laws and the principles of that decision should be reaffirmed in this case.

In *Sinclair* the Court was asked to compare the language of Section 4 of the Norris-LaGuardia Act[6] with the later enacted Section 301 of the Labor-Management Relations Act of 1947.[7] The former provides in relevant part that:

> "No Court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> * * *
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;"

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[6] 47 Stat. 70, 29 U.S.C. §104.
[7] 61 Stat. 156, 29 U.S.C. §185.

The later statute merely extends the jurisdiction of the District Courts of the United States to actions involving violations of contract between employers and labor organizations "without respect to the amount in controversy or without regard to the citizenship of the parties."[8]

The Court, in *Sinclair*, was faced with the argument, again presented now, that the two Congressional enactments must be read "in harmony" one with the other and that the stringently prohibitory language of the earlier statute should be "accommodated" with Section 301 in order to once again vest in the District Courts the injunctive powers that they lost by reason of the 1932 anti-injunction legislation.

A. The Clear Language of Both Statutes Reveals That No Partial Repeal of Section 4 Was Intended Upon Passage of Section 301.

As the Court has emphasized before, statutory language is at least the foremost guide to the legislative intent if not conclusive of that intent[9] and in *Sinclair* this rule was employed. The Court construed the provisions of Section 4 of the Norris-LaGuardia Act as

> ". . . so broad and inclusive that [the Act] leaves not the slightest opening for reading in any exceptions beyond those clearly written into it by Congress itself. (Footnote Omitted) We cannot ignore the plain import of a Congressional enactment, particularly one which, as we have repeated-

[8] 29 U.S.C. §185(a).

[9] *United States v. American Trucking Associations*, 310 U.S. 534, 543 n. 18; *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 390-5; *United States v. Oregon*, 366 U.S. 643, 648.

ly said, was deliberately drafted in the broadest of terms in order to avoid the danger that it would be narrowed by judicial construction."[10] (Footnotes Omitted)

Turning to the language of Section 301 of the Labor-Management Relations Act itself, the Court commented that:

> "It is especially significant that the Section contains no language that could by any stretch of the imagination be interpreted to constitute an explicit repeal of the anti-injunction provisions of the Norris-LaGuardia Act in view of the fact that the Section does expressly repeal another provision of the Norris-LaGuardia Act dealing with union responsibility for the acts of agents. (Footnote Omitted) If Congress had intended that Section 301 suits should also not be subject to the anti-injunction provisions of the Norris-LaGuardia Act, it certainly seems likely that it would have made its intent known in this same express manner. . . . Thus, failure of Congress to include a provision in Section 301 expressly repealing the anti-injunction provisions of the Norris-LaGuardia Act must be evaluated in the context of a statutory pattern that indicates not only that Congress was completely familiar with those provisions but also that it regarded an express declaration of inapplicability as the normal and proper manner of repealing them in situations where such repeal seemed desirable."[11]

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[10] 370 U.S. at 202.

[11] *Id.* at 204.

The statutes here involved have remained unchanged in all particulars since the *Sinclair* decision and the argument remains as viable now as it was then. It has been the established law of the United States since the passage of the Norris-LaGuardia Act that the Courts of the United States may not enter injunctions in labor disputes. The later Congressional enactment, opening the doors of those courts to litigation for breaches of collective bargaining agreements without respect to the amount in controversy or to the citizenship of the parties, stopped well short of expanding the scope of relief that could be granted in such cases.[12]

B. The Legislative History of Section 301 Compels the Conclusion That Congress Never Intended to Tamper With the Established and Settled Principles Enunciated by the Norris-LaGuardia Act.

(1) Congress Considered the Very Point but Decided Against It.

Section 301(a) as enacted into law is almost identical to the original Senate Bill, S. 1126, as reported.[13]

[12]The Preamble of the Norris-LaGuardia Act ended with the following words: "therefore, the following definitions of, and *limitations upon*, the jurisdiction and authority of the Courts of the United States are enacted." (Emphasis Added) 47 Stat. 70, 29 U.S.C. §102. That the Congress did not intend, in 1947, to retreat from the limitations imposed by the earlier act is evident from the fact that sub-section (b) of Section 301 of the Labor-Management Relations Act makes specific reference to "any money judgment against a labor organization" 29 U.S.C. §185(b) and from the further fact that sub-section (e) of Section 301 is an express repealer of certain provisions of *another* section, Section 6, of the Norris-LaGuardia Act. 370 U.S. at p. 204 (n. 17).

[13]I Legislative History of the Labor-Management Relations Act 1947, 151.

No reference was made to Norris-LaGuardia at all in the original Senate Bill.

However, the House version of the same subject matter, H.R. 3020, appended to Section 302, subsection (e), which provided as follows:

> "(e) In actions and proceedings involving violations of agreements between an employer and a labor organization or other representative of employees, the provisions of the Act of March 23, 1932, entitled 'An Act to amend the Jurisdictional Code and to define and limit the jurisdiction of courts sitting in equity and for other purposes,' shall not have any application in respect of either party."[14]

Thereafter the Senate version survived a conference between committees of the House and the Senate with only slight modifications and H.R. 3020 as originally written did not. On June 3, 1947, Congressman Hartley submitted from the conference committee a report to accompany H.R. 3020 which explained the deletion of Section 302(e) of the original Bill in the following language:

> "Section 302(e) of the House Bill made the Norris-LaGuardia Act inapplicable in actions and proceedings involving violations of agreements between an employer and a labor organization. Only part of this provision is included in the conference agreement. Section 6 of the Norris-LaGuardia Act provides that no employer or labor organization participating or interested in a labor dispute shall

[14] *Id.* at 222.

be held responsible for the unlawful acts of their agents except upon clear proof of actual authorization of such acts, or ratification of such acts after actual knowledge thereof. This provision in the Norris-LaGuardia Act was made inapplicable under the House Bill. Section 301(e) of the conference agreement provides that for the purposes of Section 301 in determining whether any person is acting as an agent of another so as to make such other person responsible for his actions, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."[15]

There exists, therefore, the clear statement of one of the two sponsors of the Taft-Hartley Act, a member of the conference committee who joined in preparing the conference report[16] that, whereas the House sought repeal of two provisions of Norris-LaGuardia, only the one survived the conference and became law.[17]

As noted in the *Sinclair* decision the other sponsor of the Bill which also bears his name, Senator Taft, stated on the floor of the Senate that the conference committee had rejected repeal of Norris-LaGuardia.[18]

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[15] *Id.* at 570.

[16] *Id.* at 573.

[17] Such statements as found in the conference report prepared by a sponsor and member of the committee of conference are entitled to more weight than other evidences of legislative history. *U.S. v. United Mine Workers,* 330 U.S. 258, 278-280 (1947); *National Woodwork Manufacturers Association v. Labor Board,* 386 U.S. 612 (1967) 639-640.

[18] 370 U.S. at 208; II Leg. Hist. 1544.

The Senator's exact words were as follows:

> "The conferees rejected the broad prohibition of all kinds of strikes. They rejected the repeal of the Norris-LaGuardia Act. The provisions regarding injunctions are exactly those which were in the Senate Bill, and were approved by the Senate. *The only strikes which are declared to be illegal are secondary boycotts and jurisdictional strikes.* In such cases the injunction can be obtained only through the National Labor Relations Board and in that respect the House accepted entirely the provisions of the Senate Bill."[19]

(2) The Court Cannot, by the Indirection of "Accommodation," Vitiate the Statute That Congress Intended to Remain in Force.

The Court's opinion in *Sinclair* termed the word "accommodation" a "soft euphemism."[20]

Having demonstrated the clear intention of the Congress not to tamper with the anti-injunction provisions of Norris-LaGuardia, it is submitted that the present attack upon the *Sinclair* opinion is inappropriate and symptomatic of Petitioner's frustration with the Congress for its failure to respond to the invitation to act implicit in the *Sinclair* decision.[21]

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[19] II Leg. Hist. 1544 (Emphasis Added).

[20] 370 U.S. at 209.

[21] Since *Sinclair* the only bills submitted, S. 2132, 89th Cong., 1st Sess. (1965) and H.R. 9059, 89th Cong., 1st Sess. (1965) would have provided for the inapplicability of the Norris-LaGuardia Act to proceedings to enjoin the violation of, or to enforce, arbitral awards if the collective bargaining agreement of the parties both provided for submission to binding arbitra-

(This footnote is continued on the next page)

The argument that the *Sinclair* decision has created "disharmony" in the fabric of the Federal labor law is, of course, to say that the Congress has created such disharmony. For reasons set forth in this brief, *infra*, Respondent contends no discord between the statutes exists. However, and even if it did, all that this Court is empowered to do is to determine that any disparity must be left to legislative reconcilation.

> "To marshal these considerations is to suggest, not that there is no case for wise legislative action, but that there is no case for judicial reconsideration of *Sinclair*. The problem, if one exists, and the solution, if is desired, rests with Congress. Whether an injunction to restrain a strike over an arbitrable dispute should be part of the judicial arsenal in a Section 301 action, and the terms upon which it should be granted if available, are issues which engage competing considerations on both the intellectual and partisan level. *Sinclair* addressed these issues to Congress. It is no part of the judicial function to respond to a controversial claim of what the commonweal supposedly requires when Congress has chosen not to act."[22]

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tion and contained the express agreement of the parties that the Norris-LaGuardia Act should not apply. Since the failure of passage of these bills, courts have enforced arbitral orders and enjoined violations of them in *Philadelphia Marine Trade Assn. v. International Longshoremen's Association Local 1291*, 365 F. 2d 295; 368 F. 2d 932, reversed on other grounds, 389 U.S. 64 (1967) and *New Orleans SS Association v. General Longshoreworkers ILA*, 389 F. 2d 369 (6th Cir. 1968) *cert. denied*, 393 U.S. 828.

[22]Dunau, *Three Problems in Labor Arbitration*, 55 Va. L. Rev. 427, 468 (1969). The author of the article was counsel for the respondent union in *Avco Corp. v. Aero Lodge 735, IAM*, 390 U.S. 557 (1968) in which this Court held that actions for injunctive relief in labor disputes filed in State Courts are removable to the Federal Courts.

C. No Vital Consideration of the Federal Labor Policy Requires the Adoption of a Rule Contrary to Sinclair.

The Petitioner and the *amici* all deplore the serious and disruptive nature of strikes allegedly in violation of contract and suggest it is a severe labor problem on a National scale, yet the case here presented is only a minor incident in the context of the National labor policy.

In the present case petitioner operates thirty-five super markets in Southern California (App. 5) and suffered a work stoppage, according to its Complaint in the California Court, at one of those stores which lasted only until the following day, February 19, 1969, at which time it was restrained by the Los Angeles Superior Court (App. 8-9, 39). Even under petitioner's statement of the facts (denied in all material respects by respondent in its Answer filed in the United States District Court) petitioner would not have stated a claim (App. 11) sufficient for subject matter jurisdiction of the Court were it not for Section 301's suspension of that requirement in labor cases.[23]

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[23]29 U.S.C. §185(a). The Complaint in the present case, in alleging both that petitioner's agreement is with respondent and that respondent itself called, directed and oversaw the work stoppage (App. 5, 8-11) does not bring the case within the purview of the kind of work stoppage violative of collective bargaining agreements commonly referred to as "wild-cat strikes." However, it is submitted that cases arising in the State and Federal Courts under the facts presented here, and in *Sinclair* and *Avco v. Aero Lodge, supra,* note 22, will quite often present the circumstance of a wild-cat strike. The *Report of the Members Representing Labor Unions,* of the special Atkinson-Sin-

(This footnote is continued on the next page)

Here a few union members employed in one supermarket of a thirty-five store chain out of several thousand union members employed in supermarkets, drug stores and discount stores (App. 4-5) allegedly engaged in a work stoppage and picketed. The incident came close to the termination of a five-year collective bargaining agreement (App. 5, 8) at a time when some friction can be expected between the bargaining parties as the termination of the contract approaches. As Mr. Dunau's article observes:

> ". . . although there are no satisfactory statistics, it is probable that the overall incidence of strikes over disputes submissible to arbitration is quite small. In perspective the problem may be fairly minor. It is thus doubtful that relieving the vexation of the breach of contract strike in the individual case is worth the risk of even a limited intrusion of the strike injunction."[24]

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clair Committee of the American Bar Association Section of Labor Relations Law, 1963 Proceedings, recites:

> "Few of the strikes which are alleged to be in violation of contract are actually authorized strikes. They more commonly fall within the classification of 'wild-cat strikes.' Since wildcat strikes are neither sanctioned nor supported by the bargaining representative, it is difficult to see just how the right to injunctive relief in the Federal Courts, running against the individuals involved, can be of any material assistance in settling the dispute. The Court cannot require the original 'wild-catters' to return to work individually. To command the union to call off the strike or to urge the strikers to return to work is a mere surplusage, since, by definition, a wild-cat strike is unauthorized to begin with, and the union has attempted to meet its contractual obligations." (1963 Proceedings of the American Bar Association Section of Labor Relations Law, Special Atkinson-Sinclair Committee Part II, Pg. 233.

[24]Dunau, (*supra*) n. 22 at 465.

(1) There Is No "Inequality of Right" Inherent in the Sinclair Rule.

The argument is made by petitioner, by the *amici*, and by several writers[25] that the failure of the court to interpret the Congressional intent to be one of repeal in Section 301 or, failing that, the refusal of the court to "accommodate the two statutes" creates an inequitable situation in which the employers' right to insist upon enforcement of valid collective bargaining agreements has no effective remedy when it comes to work stoppages and strikes. The argument is incorrect. In fact, the overruling of *Sinclair* would itself result in inequity. Under present law the innocent party in a bargaining agreement breach, whether employer or union, may not enjoin the breach pending arbitration. Thus, if an employer wrongfully discharges a member of the union, the latter may not enjoin the discharge but rather must proceed to arbitration. If the union or its members without its sanction, cause a work stoppage, likewise the employer may not enjoin it but must proceed to arbitration. A similar result would obtain should the employer improperly subcontract bargaining unit work.

However, upon adopting the rule sought by petitioner, the Court will have effectively tipped the balance of collective bargaining obligations in favor of the employers and against the unions and their members. Then the employer could enjoin the union's breach but the union would not be free to exercise the same right

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[25]See *e.g.*, Cox, *Current Problems in the Law of Grievance Arbitration*, 30 Rocky Mt.L.Rev. 247 (1957) and *Aaron, Labor Injunctions in the State Courts*—Part II: A Critique, 39 Va. L. Rev. 1147 (1964).

and to seek the same remedy if the employer breached the contract.

"We doubt that our brethren on the management side would respond favorably to the suggestion by some neutral members that by such amendment to the Norris-LaGuardia [Act] the Federal District Courts will also be open to the unions for temporary injunctive relief to forestall certain management decisions pending resolution of their contractual validity by the arbitrator.

"Permitting the court to determine if there is a no-strike clause, if the grievance was arbitrable, and if the action taken is a strike, is permitting the court to *administer* the contract in exactly the same way it would be *administering* the contract if the union could obtain from the court a prior restraint on the employer's promoting, demoting, discharging, making seniority adjustments, assigning overtime, subcontracting, retiming jobs, making work assignments, etc."[26]

Mutuality of remedy, whether before the arbitrator or the courts is essential to the federally protected balance of collective bargaining. The restoration of injunctive powers to the District Courts will again place labor-management disputes primarily in the courts. Moreover, the decision of a Federal judge, without the hearing of evidence, in granting or refusing to grant an application for an injunction, will unfairly prejudice the non-prevailing party in the ensuing arbitration since its burden there will also consist of seeking, in

[26] 1963 Proceedings of the American Bar Association Section of Labor Relations Law, Special Atkinson-Sinclair Committee, Part II, p. 238.

effect, the arbitral overruling of the District Court, the very Court that may subsequently be requested to confirm, modify or vacate the award.[27]

Conceivably the injunctive proceeding will have served to undermine the arbitral process. In this context, the interpretation by the Court of the inter-relation of Section 301 of the Labor-Management Relations Act and Section 4 of the Norris-LaGuardia Act, announced in *Sinclair,* is entirely consistent with the Court's earlier decisions in *Textile Workers Union of America v. Lincoln Mills of Alabama*[28] and the *Steelworker "Trilogy of Cases."*[29]

Neither petitioner, nor the *amici*, nor the writers, put forward any satisfactory or compelling evidence that the strike in breach of a collective bargaining obligation is a major, or even a significant, disruption of the national federal labor policy. This Court may, therefore, conclude that the remedies already allowable to employers, the damages expressly referred to in Section 301[30] and the right to enforce all of the salient provisions of an arbitrator's award[31] are wholly adequate, and because of their adequacy there is no reason to take the drastic steps of overruling a prior decision of the court and judicially striking the provision of a viable statute of the United States under the guise of "re-interpretation" of the Congressional intent.

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[27] 9 U.S.C. §§ 9 through 11; 61 Stat. 669.

[28] 353 U.S. 448 (1957).

[29] *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564; *United Steelworkers of America v. Warrior and Gulf Nav. Co.*, 363 U.S. 574; and *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

[30] 29 U.S.C. §185(b).

[31] *Phila. Marine Trade Assn. v. Internat'l Longshoremen's Assn., supra,* 21.

D. 28 U.S.C. Section 1450 Does Not Dictate That a State Court Injunction Issued in a Labor Dispute Must Continue Until Modified or Dissolved by the Federal District Court.

Section 1450[32] deals with the attachment or sequestration of the goods or estate of a defendant. *Amicus Curiae* General Electric Company has cited language from Professor Moore's work, *Moore's Federal Practice* for the proposition that "all injunctions . . . had . . . prior to [the case's] removal shall remain in full force and effect until dissolved or modified by the District Court.[33] While Professor Moore recites this rule, he does so not in the context of labor law and strike injunctions, but in the framework of the status of attachment or sequestration upon removal from State to Federal Court.

This reliance on Professor Moore's treatise is misplaced and misleading. Moore does discuss the problem of a Section 301 removal action not, however, in the context as cited by the *Amicus*. Recognizing the critical distinction between equity jurisdiction—from which authority is derived the dispensation of certain forms of equitable relief, including injunctions—and original jurisdiction—the power to entertain the claim, Moore recites:

> ". . . any Section 301 type of action brought in the state court can be removed and proceeded with, since the suit is based on a federal cause

[32] 62 Stat. 940, 28 U.S.C. §1450.

[33] 1A *Moore's Federal Practice*, Para. 0.168(4.-5) 2d Ed. 1965.

of action, *unless injunctive relief of such a nature is involved that the federal courts lack jurisdiction because of the Norris-LaGuardia Act.*"[34] (Emphasis added).

Moore does not advocate that the State Court injunction continues to be effective until modified or dissolved as contended by the *Amicus*. He recognizes the limitations imposed upon the Federal equitable jurisdiction because of the Norris-LaGuardia Act. His position as to the status of the State Court injunction after removal is, at best, unclear.

This interpretation of Moore's treatise is consistent with recent Federal Court decisions. In *General Electric Co. v. Local Union 191,* 413 F. 2d 964 (5th Cir. 1969), the Court of Appeals dissolved a State Court injunction under similar circumstances, holding:

"We are of the view that the District Court did not err in dissolving the injunction, not because either *Sinclair, supra,* or *Avco, supra,* explicitly dictates that result, but because, in our view, once this case was removed, *a failure to dissolve the State Court injunction would have been tantamount to issuance of that same injunction by the Federal District Court which, as we have just noted, would be proscribed by the Norris-LaGuardia Act under the Sinclair decision.*"[35] (Emphasis added).

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[34] *Id.* at page 1009.

[35] Accord, *Day-Brite Lighting Division v. IBEW,* 303 F. Supp. 1086 (D.C. Miss. 1969), wherein the court held:

"Federal jurisdiction being present, this court is required to dissolve the ex parte state court injunction which issues in a labor dispute affecting interstate commerce. Section 4 of the Norris-LaGuardia Act so requires."

Labor injunctions are governed by Norris-LaGuardia. For this reason, to accept the argument that State Court injunctions remain in effect until dissolved or modified by the Federal Court requires the conclusion that Federal Courts may enforce injunctions they could not have initially issued. If Norris-LaGuardia deprives the Federal Court of equitable power to issue such injunction, it should prevent the State Court injunction from assuming the elevated status of a valid Federal Court order. Otherwise, the Federal Court will be able to do indirectly what it cannot do directly.[86] Upon removal, the State Court order is void. This conclusion would be most consistent with the desired result of a uniform national labor law. As suggested by one writer:[87]

> "even if removal itself does not render the state court injunction void and it remains temporarily in effect, the federal court which could not have issued it and should not be able to enforce it, 'has no alternative but to dissolve' it upon appropriate motion by the union."

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[86]See Bartosic, *Injunctions and Section 301: The Patchwork of Avco and Philadelphia Marine on the Fabric of National Labor Policy*, 69 Col. L. Rev. 980 (1969). The author cites *Ex Parte Fisk*, 113 U.S. 713 (1885) in which the defendant failed to comply with a State Court order requiring out-of-court testimony pursuant to a New York statute. After removal the defendant persisted in his refusal to testify. The Federal Court cited him for contempt. The Supreme Court reversed in a *Habeas corpus* proceeding, holding:

> "When . . . a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void."

[87]*Id.* at 995.

E. Decisions Under the Railway Labor Act and the Anti-Trust Laws Are Inapposite to This Case.

(1) The Railway Labor Act.

The argument that, because the Railway Labor Act was considered with the Norris-LaGuardia Act,[88] Section 301 of the Labor-Management Relations Act should also be considered with the Norris-LaGuardia Act is not supported by case law. This Court has clearly held that:

> "The relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act, 49 Stat. 449, as amended, 29 U.S.C. 151, *et seq.* It is one of those differences which underlies the controversy in this case."[89]

The Brotherhood contended that the Norris-LaGuardia Act should apply in railroad labor cases in the same manner as it applies to other cases. In distinguishing the accommodation made between the Railroad Labor and Norris-LaGuardia Acts, the Court held:

> "The Brotherhood has cited several cases in which it has been held that the Norris-LaGuardia Act's ban on Federal injunctions is not lifted because the conduct of the Union is unlawful under some other statute. We believe that these are in-

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[88] *Brotherhood of Railway Trainmen v. Chicago River & Indiana Railway Co.*, 353 U.S. 302 (1957).

[89] *Id.* at p. 30, 31 n. 2, See also Note, *Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-La Guardia*, 70 Yale L. J. 70 (1960); 72 Harv. L. Rev. 354 (1958).

apposite to this case. None involved the need to accommodate the statutes, when both were adopted as part of a pattern of labor legislation."[40]

Because of the clear language quoted above, respondent submits that petitioner asks the Court not only to overrule its decision in *Sinclair*, but also the quoted portions of the *Chicago River* case as well.

(2) The Anti-Trust Laws.

Petitioner has placed reliance upon *United States v. Hutcheson*[41] in which the Court spoke of the Norris-LaGuardia Act, and the Sherman and Clayton Anti-Trust Acts as "interlacing."[42]

Respondent submits that *Hutcheson* is of no assistance to petitioner's argument in this case—the "interlacing" or "harmonizing" to be accomplished here consisting of no longer giving effect to a part of Norris-LaGuardia—because the Court in *Hutcheson* expressly held that Norris-LaGuardia overrode the two anti-trust enactments and insulated labor conduct "from the taint of being a 'violation of any law of the United States', including the Sherman law."[43]

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[40] 353 U.S. 30, 42.

[41] 312 U.S. 219 (1941).

[42] *Id.* at 231.

[43] 312 U.S. at 236. Justice Frankfurter remarked:

> "Congress in the Norris-LaGuardia Act has expressed the public policy of the United States and defined its conception of a 'labor dispute' in terms that no longer leave room for doubt. *Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940). This was done, as we recently said, in order to 'obviate the results of the judicial construction' theretofore given the Clayton Act. *New Negro Alliance v. Grocery Co.*, 303 U.S. 552, 562." (312 U.S. at 234).

V.

CONCLUSION.

For the foregoing reasons respondent respectfully requests that the judgment of the Court of Appeals for the Ninth Circuit be affirmed.

Dated: March 25, 1970.

Respectfully submitted,

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